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Nos. 81-520 and 81-522

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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NATIONAL FOOTBALL LEAGUE, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, ET AL.

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NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

DANIEL M. ARMSTRONG
*Associate General Counsel*

C. GREY PASH, JR.
*Counsel*

LISA B. MARGOLIS
*Counsel*
*Federal Communications Commission*
*Washington, D.C. 20554*

## QUESTION PRESENTED

Whether the Federal Communications Commission lawfully eliminated rules that severely restricted the distant broadcast signals and syndicated programs that cable television operators could offer their subscribers, in light of overwhelming evidence that those rules were not necessary for their intended purpose and disserved the public interest in program diversity.

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### OPINIONS BELOW

The opinion of the court of appeals (81-522 Pet. App. 1c-47c) is reported at 652 F.2d 1140. The decision of the Federal Communications Commission (81-522 Pet. Supp. App.) is reported at 79 F.C.C.2d 652.

## JURISDICTION

The judgment of the court of appeals was entered on June 16, 1981. The petitions were filed on September 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case involves the Federal Communications Commission's decision to repeal its distant signal and syndicated program exclusivity rules for cable television systems. 47 C.F.R. 76.61, 76.151-76.161; see 81-522 Pet. App. 1b-40b.[1] Cable systems generally are required, upon request, to carry the signals of all broadcast stations in the local television market. See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 (1972) (opinion of Brennan, J.). This requirement remains in effect. The now-repealed distant signal rules limited the number of television signals that a cable system could import from an area beyond the local television market. The limit varied directly with the size of the television market served by the cable system and the number of available broadcast signals within the market. As the court of appeals observed, "[b]y limiting the number of distant signals, the FCC sought to lessen potential adverse impact on the audience shares of local stations, a policy which ha[d] the additional effect of lessening the attractiveness of cable to potential subscribers" (81-522 Pet. App. 10c; footnote omitted).

The syndicated program exclusivity rules required cable television systems to delete certain non-network

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[1] Other FCC rules provide for the exclusivity of network programs, which, unlike syndicated programs, generally are shown by all affiliates at the same time. The exclusivity rules for network programs have not been affected by the FCC's decision here. See 81-522 Pet. App. 42c-43c n.4.

programs from the distant television signals that the systems otherwise could have carried. Those rules authorized the holder of the copyright to the particular program or a local broadcast television station that had purchased exclusive exhibition rights to the program to demand that the cable system delete the program from the distant signals it imported and transmitted to its subscribers. See generally 81-522 Pet. App. 9c-11c.[2]

When the distant signal and syndicated program exclusivity rules were adopted in 1972, they were based not on clear evidence but on intuition and political compromise. 81-522 Pet. App. 8c-9c; 81-522 Pet. Supp. App. 666-667 & n.15. The Commission frankly admitted that the "facts underlying its theoretical concerns were not fully understood" (81-522 Pet. Supp. App. 666). The distant signal rules were based on an "intuitive model" which assumed that an unregulated cable industry would experience virtually unlimited growth, drawing a substantial number of viewers from local broadcasters, thereby reducing licensees' advertising revenues and their ability to provide service to the public. *Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977); see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 173-178 (1968).

The syndicated program exclusivity rules arose out of a consensus agreement among major elements of

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[2] A prior version of the distant signal rules was involved in the Court's decision in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and was discussed in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 & n.17, 665-667 (1972) (opinion of Brennan, J.).

the cable television, broadcast television, and television program production industries—negotiated in 1972 by the White House Office of Telecommunications Policy[3]—in an effort to facilitate passage of copyright legislation covering cable television.[4] 81-522 Pet. Supp. App. 746-747. Cable retransmission of both local and distant broadcast signals was not covered by the 1909 Copyright Act and therefore did not subject the cable operator to copyright liability. See *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1960); *Teleprompter Corp.* v. *Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974). Because of the process of political compromise by which the exclusivity rules were adopted, "there was virtually no economic analysis of their functioning either by the Commission or, apparently, by the industry groups involved" (81-522 Pet. Supp. App. 746-747).

The Commission's decision in 1980 to repeal the rules was part of a continuing process of reexamining its regulatory scheme for cable television and eliminating restrictions where it had been shown that such revisions will expand the supply of programs to cable subscribers without creating risks of serious

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[3] Limitations of the type included in the negotiated exclusivity rules were not contained in the cable television distant signal rules the Commission was prepared to adopt in 1971. 81-522 Pet. Supp. App. 746.

[4] See *Geller* v. *FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979), where the court ordered the Commission to reexamine the syndicated program exclusivity rules to determine whether there was any valid reason for retaining them in view of the fact that the copyright legislation justification had "long since evaporated."

harm to "over-the-air" television viewers. 81-522 Pet. Supp. App. 815.[5]

2. The inquiry in this proceeding was instituted in 1976, shortly after the enactment of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. (Supp. III) 101 *et seq.* See *Notice of Inquiry in Docket No. 20988*, 61 F.C.C.2d 746 (1976); *Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977). Among other things, that Act adopted a system of compulsory licensing of copyrighted programming to cable television, with cable systems for the first time being subject to partial liability for copyright royalties, fixed by statute, for such programming. See 17 U.S.C. (Supp. III) 111(c) and (d). The Commission's inquiry resulted in two extensive staff reports advocating elimination of the distant signal and syndicated programming exclusivity rules. *Report in Docket No. 20988*, 71 F.C.C.2d 951 (1979); *Report in Docket No. 21284*, 71 F.C.C.2d 632 (1979). Employing theoretical economic studies as well as case studies of the actual operation of cable systems in differing environments—including "grandfathered" cable systems that already were subject to less stringent regulation than that in effect under the 1972 rules (71 F.C.C.2d at 688; 81-522 Pet. App. 26c)—the reports tested the "intuitive" assumptions on which the rules had been based. See 71 F.C.C. 2d at 635-636, 661-713, 967-985. Each of the reports concluded that the impact on broadcasting stations from elimination of the rules would

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[5] See, *e.g.*, *First Report and Order in Docket No. 20561*, 63 F.C.C.2d 956 (1977); *Second Report and Order in Docket No. 20561*, 68 F.C.C.2d 18 (1978) (eliminating restrictions on small cable systems); *Report and Order in Docket No. 20487*, 57 F.C.C.2d 625 (1976) (expanding distant signals that cable systems could carry).

be negligible and that elimination of the rules would afford substantial benefits to cable television viewers in the form of increased viewing options. 71 F.C.C. 2d at 713-715, 985-988.

Based upon the *Reports*, the Commission issued a *Notice of Proposed Rule Making*, 71 F.C.C.2d 1004 (1979), that proposed to delete the distant signal and syndicated program exclusivity rules. After widespread public comment and further administrative study, the Commission issued an exhaustive opinion reaffirming the conclusions of the earlier inquiries that elimination of the rules would provide substantial benefits to cable television viewers without disadvantaging broadcasters or "over-the-air" television viewers. 81-522 Pet. Supp. App. 663-900. "[T]he evidence amassed in this proceeding," the Commission stated, "demonstrates clearly that increased competition from less proximate broadcasters will not affect adversely the performance of local television broadcasters. Additionally, there is no evidence that shows that maintenance of the rules expands the supply of television programming or that elimination of the rules will threaten the continued supply of programming" (81-522 Pet. Supp. App. 814). Moreover, the Commission determined that "[t]he regulations artificially restrict competition and thereby deny consumers services that they are willing to pay for. The rules also have the effect of restricting diversity in television programming by delaying or impeding the provision of new cable television service in many communities" (81-522 Pet. Supp. App. 813). Finding that elimination of the rules therefore would enhance consumer welfare generally without disadvantaging non-cable viewers, the Com-

mission concluded that its "obligation to rescind the rules is clear" (81-522 Pet. Supp. App. 815).

The *Report and Order* also rejected an alternative proposal that would have required cable operators to obtain program-by-program permission ("retransmission consent") from the distant television station before carrying that station's programming.[6] In the Commission's view, this proposal was inconsistent with Congress' decision to grant cable systems a compulsory license to transmit broadcast programs and to provide for the royalty for such transmission to be established by the Copyright Royalty Tribunal, rather than through individual negotiations. 81-522 Pet. Supp. App. 769-813.

3. On petitions for review, the court of appeals upheld the Commission's decision. The court carefully examined the language and the legislative history of the Copyright Act of 1976 and concluded that Congress did not, as petitioners argued, intend to codify the FCC's cable television rules in the 1976 Act or to bar the FCC from rescinding them. 81-522 Pet. App. 18c-22c. Observing that 17 U.S.C. (Supp. III) 801 authorizes the Copyright Royalty Tribunal to readjust the statutory royalty rate paid by cable operators for the transmission of programming subject to compulsory licensing in the event of an administrative alteration of the FCC's rules, the Court found that "[t]he plain import of § 801 is that the FCC, in its development of communications

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[6] This proposal was advanced by the National Telecommunications and Information Administration of the Department of Commerce, but was opposed by the Department of Justice, the Copyright Office, and the Congressional Research Service, which were of the view that the Commission was without authority to adopt the proposal. 81-522 Pet. Supp. App. 782.

policy, may increase the number of distant signals that cable systems can carry and may eliminate the syndicated exclusivity rules, in which event the Tribunal is free to respond with rate increases" (81-522 Pet. App. 21c-22c).

The court of appeals also concluded that the suggested retransmission consent scheme would be "inconsistent with a basic arrangement of the new [copyright] legislation" (81-522 Pet. App. 23c) because cable operators would be forced to negotiate with numerous broadcasters and would not be guaranteed retransmission rights, "a scenario Congress considered unworkable when opting for the compulsory licensing arrangement." Thus, retransmission consents "would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected" (*ibid.*). In addition, the court noted that "[a] rule imposing a retransmission consent requirement would also directly alter the statutory royalty formula by precipitating an increase in the level of payments of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme * * *, [which] delegate[s] broad discretionary authority to the [Copyright Royalty] Tribunal, and not the FCC, to readjust the rates if regulatory action so require[s]" (81-522 Pet. App. 23c-24c).

The court found no basis for the argument that the Commission was required to "grandfather" existing program exclusivity contracts. It pointed out that "[t]he property of regulated industries is subject to such limitations as may reasonably be imposed in the public interest" and that "in deciding not to grandfather existing exclusivity rights, the Commission considered evidence indicating that these ex-

clusivity rights were rarely asserted" (81-522 Pet. App. 31c-32c).

In reviewing the Commission's decision in its entirety, the court concluded that it "reflects the 'rational weighing of competing policies' Congress intended to be exercised by the agency and to be sustained by a reviewing court" (81-522 Pet. App. 37c-38c). The court found no reason to "doubt the reasonableness of the FCC's conclusion that programming on free television will not substantially change or diminish after deregulation" (81-522 Pet. App. 34c). It added that "[i]n shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal" (81-522 Pet. App. 36c).[7]

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petitions for a writ of certiorari also present no important, unsettled question of law that warrants this Court's attention. Further review therefore is unnecessary.

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[7] The court of appeals also rejected the argument that insufficient consideration was afforded to the effect of deregulation on sports programming. 81-522 Pet. App. 27c, 32c-33c. It pointed out that "the Commission did respond to the sports leagues' comments in the Report and Order"; that "the leagues did not produce any evidence that the number of sports broadcasts by home clubs has been reduced in the existing areas of high cable penetration, or would be reduced in the future"; that "many variables besides the availability of sports programming on television influence gate attendance"; and that "[i]t was not arbitrary for the FCC to conclude that sports programming requires no special protection after the repeal of the distant signal rules." 81-522 Pet. App. 32c-33c.

1. Last Term, this Court once again emphasized the FCC's "broad power to regulate in the public interest" and the "broad discretion" Congress granted the Commission in determining how best to achieve the goal of the Communications Act of 1934 "to secure the maximum benefits of radio to all the people of the United States" (*FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), slip op. 11, quoting *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943)). The Court also reiterated that deference must be afforded the agency's expert knowledge when it is making predictive judgments about the direction in which the future public interest lies. *Id.* at 11-12; see also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-795 (1978).

The Commission's decision to repeal the distant signal and syndicated programming exclusivity rules at issue in this case was based on an exhaustive four-year empirical study and legal analysis in which there was widespread participation by the public and by all affected segments of the relevant industries.[8] Indeed, petitioners do not now seriously question the reasonableness of the Commission's judgment that the overall public interest will be better served by repeal of these rules. Rather, their attention is focused more narrowly on the impact of the Commission's actions on the interests of particular constituent elements of the broader public interest—

[8] See *Notice of Inquiry in Docket No. 20988*, 61 F.C.C.2d 746 (1976); *Notice of Inquiry in Docket No. 21284*, 65 F.C.C. 2d 9 (1977); *Report in Docket No. 20988*, 71 F.C.C.2d 951 (1979); *Report in Docket No. 21284*, 71 F.C.C.2d 632 (1979); *Notice of Proposed Rule Making*, 71 F.C.C.2d 1004 (1979); *Memorandum Opinion and Order*, 79 F.C.C.2d 663 (1980) (81-522 Pet. Supp. App. 663).

copyright holders, local broadcast stations, and sports television.

The argument (81-522 Pet. 21-23) that the Commission ignored its responsibility to assure the best practicable service to all the public (see 47 U.S.C. 151) rests on the mistaken premise that providing maximum protection of local broadcasting stations from competition for their markets and a greater return for copyright holders necessarily provide the only way of fulfilling that responsibility. This premise simply ignores the teaching of this Court's decisions that there are multiple—and often competing—policies that Congress, through the Communications Act, has charged the Commission with implementing. See *FCC* v. *WNCN Listeners Guild*, *supra*, slip op. 13-14; *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 796-797; *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 669 (1972). Here, the Commission engaged in a rational weighing of the effect of repeal of the rules on the statutory policy of ensuring adequate local television service, the goal petitioners stress, against the effect of repeal on the viewers' and public's interest in maximizing diversity of television service (see *FCC* v. *WNCN Listeners Guild*, *supra*, slip op. 10-14), while recognizing that Congress had separately addressed the copyright liability of cable operators in the 1976 revision of the Copyright Act. Its decision was a reasonable administrative response fully supported by a substantial record.

Based on its exhaustive investigation, the Commission found that the impact on local television stations of eliminating the restrictions on distant signals that cable systems may carry would be minimal and would be more than offset by continued revenue growth that will result from increasing population and advertising demand. 81-522 Pet. Supp. App. 742-

746. The Commission also rejected the claim, again advanced by petitioners here (81-522 Pet. 22), that the repeal of the rules providing syndicated exclusivity protection would result in the total withdrawal of syndicated programming from local broadcast exhibition. 81-522 Pet. Supp. App. 757. The Commission pointed out that the actual experience of television stations in "grandfathered" markets showed that those stations continued to purchase—and program suppliers continued to sell—even those syndicated programs that also were imported by cable from distant stations. *Ibid.*

Moreover, the Commission not only found that the local service objectives of the Communications Act would not be jeopardized by removal of these regulations; it also concluded that their retention would actually disserve the statutory objective of program diversity by depriving cable viewers of programming available on distant stations that would be carried by the cable systems but for the FCC's restrictions. 81-522 Pet. Supp. App. 813-815. In this respect, the court of appeals correctly observed that, "[i]n shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television service that should increase program diversity, a valid FCC regulatory goal" (81-522 Pet. App. 36c).

In *United States* v. *Southwestern Cable Co.*, *supra*, this Court noted the Commission's acknowledgement, when it adopted the first distant signal rules, "that it could not predict with certainty the consequences of unregulated CATV," and the Court itself recognized "that these consequences have been variously estimated." 392 U.S. at 176-177. Moreover, as this Court has only recently reiterated, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if

necessary to serve the public interest more fully" (*FCC* v. *WNCN Listeners Guild*, *supra*, slip op. 21). After a thorough reassessment, the Commission has concluded that "time and changed circumstances reveal that the 'public interest' is not served by application of the Regulations," and it has "act[ed] in accordance with its statutory obligations" in repealing them. *Ibid.*, quoting *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 225. Petitioners have offered no basis for this Court to disagree with that considered judgment.

2. Petitioner NAB nevertheless argues (81-522 Pet. 17-21) that Congress' 1976 revision of the Copyright Act had the effect of withdrawing from the Commission the authority it otherwise had under the Communications Act to repeal the rules. This contention was correctly rejected by the Commission (81-522 Pet. Supp. App. 788-813) and the court of appeals (81-522 Pet. App. 17c-22c). The plain language of the Copyright Act demonstrates that it was not intended to codify the substance of the distant signal and syndicated program exclusivity rules as they existed in 1976. Indeed, Section 801 provides for the adjustment of royalty rates in the event of an *alteration* in either set of rules (17 U.S.C. (Supp. III) 801(b)(2)(B) and (C)), thereby expressly *preserving* the Commission's broad discretion under the Communications Act to change or eliminate the rules as the public interest requires. See *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), slip op. 23-25.

The legislative history of the 1976 Act is consistent with the clear import of its language. Although petitioners accurately observe (81-522 Pet. 18) that the House Report cautioned the Commission not to rely upon the passage of the Act as a *directive* for regulatory reform, the Report also makes

clear that Congress intended to place no limitation on the Commission's authority to modify or eliminate the rules upon a finding that their continued application disserved the public interest (H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976)), precisely the finding made by the Commission here. See 81-522 Pet. App. 22c. Foreseeing the possibility that the rules might be altered, the Report expressly states that the purpose of Section 801 was to implement Section 111's scheme for extending the compulsory license established under that Section not only to the carriage of distant signals and programming then permitted, but also to any *additional* signals and programs authorized by subsequent amendment of the Commission's rules. H.R. Rep. No. 94-1476, *supra*, at 176.[9]

3. Although petitioners argue that the 1976 Copyright Act prohibits repeal of the distant signal and

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[9] Petitioners offer anecdotal evidence that three individuals, only one of whom was a legislator, believed that Congress, when it revised the copyright laws in 1976, did not anticipate that the Commission would repeal the distant signal and syndicated programming exclusivity rules. But even if these statements were persuasive indicia of the *expectations* of certain Members of Congress when the copyright law was revised, and that these expectations could be attributed to Congress as a whole, a background of such expectations, without more, would not constitute *legislation* repealing the Commission's conceded and unamended authority under *another* statute—the Communications Act—to rescind the regulations in furtherance of the public interest. See *Train* v. *City of New York*, 420 U.S. 35, 45 (1975) ("legislative intention, without more, is not legislation"). Moreover, isolated post-enactment views such as these are of limited value under any circumstances and cannot serve as a basis to ignore the plain language of the statute or the legislative intent of Congress expressed before the Act's passage. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

exclusivity rules, they make the inconsistent argument, in support of the proposed retransmission consent requirement, that "the new Copyright Act leaves the FCC free to regulate the circumstances in which cable systems may retransmit distant broadcast signals so long as broadcast stations and their program suppliers are not deprived of the minimal right established by the Copyright Act itself" (81-522 Pet. 12). Both the Commission (81-522 Pet. Supp. App. 791-808) and the court of appeals (81-522 Pet. App. 23c-25c) rejected petitioners' contorted interpretation of the 1976 Copyright Act and correctly held that adoption of a retransmission consent proposal "would be inconsistent with a basic arrangement of the new legislation" (81-522 Pet. App. 23c).

The retransmission consent scheme advanced before the Commission would have forced cable operators to negotiate individually with numerous distant broadcasters in order to be able to retransmit their signals and would have afforded the distant broadcasters the right to deny consent to retransmit their signals or to grant consent with conditions, such as the payment of a fee. See 81-522 Pet. Supp. App. 770, 800-805. Moreover, the broadcaster ordinarily would not be in a position to grant the requisite consent to a cable system without first obtaining the permission of (and paying any additional fee demanded by) the copyright owner whose programs would be retransmitted. Retransmission consent, thus, would function no differently from full copyright liability. But when it enacted the Copyright Revision Act of 1976, Congress "recognize[d] that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system" (H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 8

(1976)). It therefore rejected full copyright liability in favor of a system of compulsory licensing, subject to the mandatory payment of a royalty for retransmission of distant signals. Because the retransmission consent proposal is the equivalent of the system of full copyright liability that Congress expressly considered and rejected,[10] approval of such a scheme by the Commission " 'would in effect deprive the [1976 copyright] statute of its efficacy; in other words, render its provisions nugatory' " (*Nader* v. *Allegheny Airlines*, 426 U.S. 290, 298 (1975), quoting *Texas & Pac. Ry.* v. *Albilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907)). Faced with such "irreconcilable conflict" (426 U.S. at 299) the Commission correctly rejected the retransmission consent requirement.

The retransmission consent proposal also would have been inconsistent with the legislative establishment in the Copyright Act of both the specific royalty formula and the designation of the appropriate forum—the Copyright Royalty Tribinal—for its readjustment. As the court of appeals pointed out, "it [is] difficult to imagine that Congress intended its formula for royalty fees to be only a minimum subject to FCC alterations, since it delegated broad discretionary authority to the [Copyright Royalty] Tribunal, and not the FCC, to readjust the rates if regulatory action so required" (81-522 Pet. App. 24c).

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[10] As the Commission explained (81-522 Pet. Supp. App. 798-801), even before 1976, Congress had declined to enact proposals to require consent for retransmission by cable systems. See also *Hearings on H.R. 4347, et al. Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 35-36, 45-46 (1965); H.R. Rep. No. 2237, 89th Cong., 2d Sess. 77-88 (1966); *Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 777-785 (1975).

Petitioners' argument (81-522 Pet. 14-16) that 17 U.S.C. (Supp. III) 301, nevertheless permits adoption of the retransmission consent proposal is groundless. Section 301(d) simply provides that "[n]othing in this title annuls or limits any rights or remedies under any other federal statute." The retransmission consent proposal could not reasonably be characterized as a "right" or "remedy" provided by the Communications Act.[11] Moreover, this Court has, in any event, held that where there is a clear and irreconcilable conflict between two statutes, a general savings clause will not prevent the courts from giving full effect to the later-enacted law. See *Nader* v. *Allegheny Airlines, supra*, 426 U.S. at 299; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co., supra*, 204 U.S. at 446. The Commission correctly concluded that "the savings clause in Section 301(d) * * * does not eliminate the fundamental irreconcilability between the Copyright Revision and a Commission-imposed retransmission consent requirement" (81-522 Pet. Supp. App. 811).[12]

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[11] Indeed, the Commission concluded (81-522 Pet. Supp. App. 792-797) that, even aside from limitations imposed by the 1976 Copyright Act, it did not have authority under the Communications Act to impose a retransmission consent requirement, in view of the absence of evidence showing that this was necessary to protect local broadcast stations. The court of appeals did not reach this issue. 81-522 Pet. App. 44c n.11.

[12] Aside from the substantial legal difficulties with the retransmission consent proposal, the Commission also noted the evidence in the record that a period of experimentation with retransmission consent in 1968 had failed, that the Copyright Office had cited the "unanimous opinion of cable, broadcast and program production interests in 1971 that retransmission consent would not work," and that the expert view of the Copyright Office was that it would result in "massive retransmission denials rather than consents." 81-522 Pet. Supp. App. 786.

4. Petitioners further contend (81-522 Pet. 23-24) that the court of appeals erred in affirming the FCC's refusal to grandfather existing syndicated program exclusivity contracts when it eliminated the exclusivity rules. See 81-522 Pet. App. 31c-32c; 81-522 Pet. Supp. App. 767-768. However, the court of appeals did no more than rely on the well-established principles, accepted in this Court's holding in *United States* v. *Midwest Video Corp.*, *supra*, that " '[t]he property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest . . . new rules may abolish or modify pre-existing interests' " (406 U.S. at 674 n.31 (opinion of Brennan, J.), *quoting General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 863-864 (5th Cir. 1971)). Petitioners argue that "[t]his Court and others have repeatedly held that administrative agencies may and should take existing equities into account in modifying their rules" (81-522 Pet. 23). But the Commission *did* take existing equities into account here; it simply concluded that the record did not establish a need for a grandfather provision to protect the public interest or even to prevent injury to the private parties to such contracts. See 81-522 Pet. Supp. App. 767-768 & n.275. The reasonableness of the Commission's decision is further highlighted by the fact that the broadcast industry was placed on notice in 1976 that the rules might be eliminated. See *Notice of Inquiry*, *supra*, 61 F.C.C.2d at 751. And, although as petitioners point out (81-522 Pet. 23 n.22), a limited grandfather period of up to three years was suggested in the 1979 *Notice of Proposed Rule Making*, *supra*, 71 F.C.C.2d at 1027, that period is more than two-thirds completed already.

5. *a.* Finally, petitioner National Football League (NFL) argues (81-520 Pet. 8-11) that the Commission should have provided in its rules for the NFL to assume complete control over the telecast of the league's games in local markets, and thereby limit the number of NFL games that could be transmitted into a local market, notwithstanding the Commission's elimination of distant signal limitations for other types of programming.[13]

At the present time, NFL games are broadcast over two networks on Sunday.[14] Under the league's current contract with the networks, each game is televised back to the home territory of the visiting team, and two additional league games usually are telecast in that territory as well. In the territory of the home team, the local game is blacked out unless it is sold out 72 hours before kickoff, in order to protect the live gate, but two other games usually are telecast.

The NFL argues that the repeal of limitations on the number of distant signals that may be transmitted into a local market will result in an increase in the number of NFL games shown in that market beyond the two or three currently allowed. This potential increase, it is argued, will adversely affect live attendance at the home team's game. The NFL also argues that the potential increase in the number of televised games might have an adverse impact upon the league's goal of ensuring equal television

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[13] The NFL states (81-520 Pet. 11) that its games are carried almost exclusively over one of the three commercial television networks. The Commission's elimination of the *syndicated* programming exclusivity rules therefore presumably will have no impact on the NFL.

[14] The third network carries games on Monday nights and at other special times.

revenue and roughly equal exposure for member clubs. Accordingly, the NFL argues that the Commission was required to provide the NFL with some means by which it could limit the number of games telecast in any one market to two or three (or more, presumably, if the league so elected). The court of appeals properly rejected this contention, concluding that "[i]t was not arbitrary for the FCC to conclude that sports programming requires no special protection after the repeal of the distant signal rules" (81-522 Pet. App. 33c).

With respect to the protection of the live gate, the most important protection for this source of revenue insofar as cable television is concerned—the black out rule (47 C.F.R. 76.67)—remains in force and is not affected by the Commission's action under review here. Moreover, as the FCC and court of appeals both observed (81-522 Pet. App. 33c; 81-522 Pet. Supp. App. 810), other factors, such as the weather and the caliber of the home and visiting teams, appear to have a greater impact on home attendance than does the availability of sports programming on television. The Commission found, for example, that the television audience prefers to watch the home team's games rather than those of other teams by a 5 to 1 margin. 81-522 Pet. Supp. App. 810. Thus, there is no reason to believe that an increase in the number of out-of-town games televised in the local market will significantly affect live attendance.[15] This conclusion is consistent with the Commission's view in 1975 when it adopted the black-out rule in

[15] Does common sense suggest, for example, that New Yorkers will not go to the Meadowlands to see their Giants play the Washington Redskins simply because there is a New Orleans Saints-Tampa Bay Buccaneers game on cable television at the same time?

47 C.F.R. 76.67. Then, as now, the Commission found no "public interest rationale" for any additional protection for sports programming, because no evidence of harm from distant signal importation of sports programming had been presented. *Report and Order in Docket No. 19417*, 54 F.C.C. 2d 265, 277-283, reconsideration denied, 56 F.C.C.2d 561 (1975).

Nor does the repeal of the distant signal rules affect the NFL's policy of providing for all member teams to share equally in the league's television revenues. The league may continue to divide up television revenues equally, irrespective of whatever pattern of retransmission of broadcast games may develop. The degree to which repeal of the rules will undercut the NFL's policy of "roughly equal exposure" for all member teams is speculative at this time. It seems likely that even before the distant rules were repealed, more viewers actually *watched* games involving the better teams in the league, even if all games were made *available* to viewers on a "roughly equal" basis, as the NFL suggests. But, in any event, the interest of the league members in gaining "roughly equal exposure" for themselves must be balanced against the public's interest in diversity of programming generally.

*b.* Perhaps recognizing that the implementation of the public interest standard under the Communications Act did not, on the record in this case, require the Commission to develop special cable rules (beyond the black-out rule) for sports programming, the NFL now expressly disavows reliance on the Communications Act. See 81-520 Pet. 8-9. Instead, it argues that another Act, Pub. L. No. 87-331, 75 Stat. 732 (15 U.S.C. 1291-1295), reflects a national policy of permitting professional sports leagues to control telecasting of their games and that the Commission was required to implement that policy.

The NFL's argument based on Pub. L. No. 87-331 is in error for several reasons. First, it rests on a manifestly overbroad reading of Pub. L. No. 87-331. Although 15 U.S.C. 1291 creates an antitrust exemption for the league's pooling arrangements for the sale of broadcasting rights, 15 U.S.C. 1292 provides that the exemption shall not apply to agreements that restrict the "televising of any games within any areas, except within the home territory of a member club of the league on a day when such club is playing at home." Thus, there is no basis whatever in the statute for the NFL's argument that the FCC's repeal of the distant signal rules cannot be applied to cable transmission of NFL games in areas *outside* of the home team's territory, as the NFL urges.

That Congress intended to afford the leagues only a limited immunity for agreements restricting telecasts of sports events is evident from the legislative history as well. The purpose of Pub. L. No. 87-331 was to overrule a 1961 court decision holding that a National Football League pooling arrangement with the CBS television network violated a previous antitrust judgment. H.R. Rep. No. 1178, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. 1 (1961). That earlier judgment not only had prevented the clubs from ceding the power to determine which games should be telecast and when, but also limited the scope of permissible restrictions on the telecasting of games to those necessary to protect local gate receipts.[16] Pub. L. No. 87-331 was intended

[16] *United States* v. *National Football League*, 116 F. Supp. 319, 322-26 (E.D. Pa. 1953). Specifically, this decision found to be reasonable a restriction that would protect gate receipts by precluding teams from broadcasting their games into the home territories of other teams on days when the other teams

to overrule these earlier cases to the extent that they prohibited clubs from pooling their rights for sale to a network. The statute was not intended, however, to broaden the scope of restrictions that lawfully could be imposed. See H.R. Rep. No. 1178, *supra*, at 1-5; see also 107 Cong. Rec. 20060 (1961) (remarks of Rep. Celler).[17]

But even when Pub. L. No. 87-331 is properly read as limited to agreements that restrict telecasts in the territory of a team that is playing at home, nothing in the law suggests that the FCC is required to embody the provisions of such an agreement in its own regulations, irrespective of the public interest balance that otherwise might be struck under the Communications Act itself. Pub. L. No. 87-331 merely furnishes an exemption from antitrust liability for *private conduct* that had been held to constitute an unreasonable restraint of trade under the antitrust laws. Professional sports leagues did not thereby also acquire, *sub silentio*, an exemption from regulation by the governmental body charged with determining

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were playing at home. In contrast, it found to be unreasonable a restriction that precluded teams from telecasting their games into territories of other teams on days when the other teams were playing away from home and permitting the telecast of their games into the home territory. *Id.* at 326-327.

[17] The legislative history of Pub. L. No. 87-331 does reflect congressional concern for assuring that away-from-home games would continue to be broadcast back to the teams' home territories and for protecting the television revenues of the weaker clubs in the league. See 81-520 Pet. 4. However, Congress believed that those concerns would be met by permitting the leagues to act in concert in negotiating with the networks. H.R. Rep. No. 1178, *supra*, at 2-3; S. Rep. No. 1087, *supra*, at 2-3. There is no evidence that Congress believed that it was necessary to enlarge the scope of permissible restrictions that professional teams could employ.

and furthering the *public interest* with respect to television generally.

As times have changed, the NFL itself has determined that protection of the live gate does not require an *absolute* prohibition against telecasts in the territory of a member club playing at home, such as that contained in its contract with CBS in 1961, when Pub. L. No. 87-331 was enacted. The league now permits at least two such telecasts, as well as the home game itself if it is sold out at least 72 hours prior to kickoff. And yet the NFL argues that the FCC—the expert agency charged by Congress with making predictive judgments about the effect of telecasts—cannot similarly relax its own regulations, as they affect sports broadcasting, when the public interest warrants. The NFL has cited neither legal support nor factual justification for such a result.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

DANIEL M. ARMSTRONG
*Associate General Counsel*

C. GREY PASH, JR.
*Counsel*

LISA B. MARGOLIS
*Counsel*
*Federal Communications Commission*

NOVEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 358465 699